K. Fitzgibbon (J.) 1st Earl of Clare

1268

AN

ANSWER

TO

CERTAIN DOCTRINES:

OR A

LETTER

TO

LORD FITZGIBBON.

DUBLIN:
PRINTED BY JAMES MOORE,
No. 45, COLLEGE-GREEN.
M.DCC.XCI.

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OF

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LORD CLONCURRY.

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No. 44, College-Green.

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AN ANSWER TO CERTAIN DOCTRINES, &c.

My Lord,

YOUR Lordſhip has been pleaſed on a late occaſion to obſerve, that lawyers have put their names to libels on the judges.

This is a very ſerious charge, when we reflect from whom the charge came, and for whom it was intended: In order to do juſtice to the latter the author refers the public to the following pages, in which

your defence on the tranſaction of the regency, as well as on the ſubject of the city, is diſcuſſed.—

The gentlemen to whom your obſervations were directed appeared only to obſerve with freedom on the arbitrary proceedings and violent perſonal attack of a miniſter of ſtate. If that miniſter ſhould be an high judicial character, we may lament ſuch a confuſion of capacities, but we cannot reſpect it.

The Chancellor is made to rely on two caſes. The queſtion is on the 33d of George the ſecond, and his caſes that are to determine the conſtruction of that act were decided before the act was made. That ſuch caſes ſhould apply it is neceſſary that there ſhould be a ſimilarity in the things compared: The precedent of the corporation of Durham and the common council of Dublin, alſo a ſimilarity between a freeman contending for his right or franchiſe and an alderman claiming an

authority.

authority. He ſhould exhibit the words of the charter of Norwich and the bye-law of Durham, and ſhew them to be the ſame as the words of the act of parliament, and it is incumbent to ſhew that the ballot clauſe is a part of both; but the beſt way of expoſing his doctrine is to exhibit his caſes (ſee the caſes in the appendix). It there appears that the right of rejection was entruſted to the head of the corporation of Durham by a bye-law, which recited that the power was given in order to keep out perſons who had no juſt right: Here is a ſpecific truſt, expreſsly confined to caſes of legal right; and ſo far from being ſimilar, is eſſentially and expreſsly diſtinct from the clauſe in our act of parliament. In the caſe of Norwich, the point turned on the contradictory matter contained in the return; the determination therefore has nothing to do with the caſe of Dublin; the declaration of the judge has as little, for here the queſtion is not on the right of election but the right of rejection; the former may be conſummate in one body,

and the latter diſcretionary in another. Such a right of rejection have the privy council, according to the opinion of the Chancellor. Had the common council inſiſted that no man was elected by the board who was rejected by the commons, then Lord Holt's declaration might have applied, but the Chancellor is made ſtudiouſly to confound the right of election with that of rejection, and in this begging of the queſtion, which he never ventures to face, he ſhelters himſelf under the converſation of the bar, on which the privy council could not decide, and deſerts the petition and the act of the commons, on which alone he knows they could and did decide, and which he alſo knows went to the right of rejection, and claimed no right of election, except as it devolved on them by the omiſſion of the other party, as deſcribed in the act.

The reader will obſerve in the concluſion of the caſe of Norwich, Lord Holt ſtates the method of chuſing aldermen in London.

The

"The inhabitants of the ward chooſe two, "and if the court of aldermen think them "inſufficient, they may reject them, and "order the ward to chooſe again."—Here is the only part of his caſe which does apply, and it applies directly againſt him.

I will ſuppoſe for argument, that his caſes applied to the act, and that the common council are obliged to give reaſons to the court of King's Bench; ſtill I maintain that his doctrine and determination are not warranted by law; for the point before him was not whether the common council were obliged to give reaſons for rejection to the King's Bench, but to the board of aldermen. His caſes and principles, if applicable to the act, would only warrant the interpoſition of the King's Bench in demanding reaſons why Alderman James was rejected; he muſt produce a new ſet of caſes and principles to prove the right of the aldermen to demand reaſons, or he muſt ſhew the analogy at common law between the two courts, the court of Aldermen and the court of

King's

King's Bench. He muſt therefore prove, in order to ſupport his poſitions on this ſubject, three things:

Firſt, The analogy between his caſes and the act of parliament.

Secondly, The analogy between the King's Bench and the Board of Aldermen. And

Laſtly, That both analogies are ſo obvious, that the privy council muſt at the firſt glance perceive them. But there is a caſe in point which we ſhall ſtate, and is as follows: The corporation of A. had, under act of parliament, a right of electing a mayor; and B. had a right of rejecting given in the following words: "That upon all electi-
"ons the names of the perſons elected ſhould
"be preſented to B. to be approved of, and
"no perſon elected ſhould be ever capable
"of ſerving in the office unleſs approved of
"by B.; and in caſe any of the perſons ſhall
"not be ſo approved of by B. within a cer-
"tain time, then the corporation of A. ſhall,

"time

" from time to time, go to a new election of " fit perſons; and ſhall in like manner preſent " their names to B. until A. has choſen ſuch " perſon as ſhall be approved of as aforeſaid." The determination on this clauſe was, and the practiſe has been, that B. might exerciſe the right of rejection without aſſigning reaſons. And one among the many learned judges who made that deciſion, was the preſent lord chancellor of Ireland; and the caſe was, that of the privy council of Ireland and the corporation of Dublin. In this opinion he was right; but in this he preſumed to commit that offence which he thus deſcribes, conſtruing the proviſions of an act of parliament ſo as to ſubvert the known and ſettled principles of the common law. His reaſon for ſo doing the author has given, becauſe the privy council is a council of ſtate and ſecrecy, reſponſible to parliament; that is, becauſe his rules of conſtruction are not univerſally applicable; becauſe they are only to be applied between things which are ſimilar, and as a council of ſtate cannot be intended either from the words of the new

rules

rules or its own nature to guard the corporation againſt intruders; the chancellor don't extend thoſe principles to their caſe; he is right, but the reaſon goes ſtronger in favour of the common council; they are not intended by the act of parliament, nor by their own inſtitution enabled to guard the magiſtracy againſt intruders; they cannot exerciſe ſuch duty with any effect, nor is time allowed them by the act even if otherways they could diſcharge it; therefore it is, as in caſe of the privy council, irrational to extend to them the principles advanced by the chancellor. But there is another circumſtance which makes it abſurd and impracticable: the common council proceed by ballot, and are thereby rendered incapable of aſſigning reaſons. The defence of the chancellor makes him withhold the application of his principles to the privy council, where the application would be irrational, and extend them to the common council, where ſuch application would be impracticable as well as irrational. The defence makes the chancellor ſet up certain

principles

principles as main pillars of common law to deſtroy the privileges of the commons, and to throw down thoſe main pillars to advance the power of the council.

Having given the authority of a caſe decided by the chancellor in direct oppoſition to the doctrine of the pamphlet, we ſhall conclude with the authority of the pamphlet in direct oppoſition to the doctrine of the chancellor. The reader will recollect that the queſtion is on the conſtruction of an act of parliament. The chancellor has obſerved, that the privy council are to adopt ſuch conſtruction as will ſupport the *prima facie* title. The author obſerves, that the act † has (ſtrangely indeed he ſays) provided, that if on the day appointed for the

† His words are: But the act has ſtrangely provided in general terms, that if on the day appoiuted for electing the chief magiſtrate, either body ſhall be guilty of a default in any of the duties preſcribed to them by the ſtatute, the excluſive right of election ſhall devolve to the other.

the election of a chief magiſtrate, either body, that is the board or the common council, ſhall be guilty of a default in any one of the duties preſcribed to them by the ſtatute, the excluſive right of election falls on the other. If then the giving reaſons to the board of aldermen is not one of the duties preſcribed by the act; and the ſending down another alderman on rejection is one of the preſcribed reaſons, it follows, from the author's ſtate of the act, that the excluſive right devolved on the commons. Now the giving reaſons to the board on rejection is not one of the duties preſcribed by the act; and the ſending down another alderman on rejection is one of them; therefore the excluſive right of election did on a late occaſion devolve on the commons; and the chancellor's doctrine and declaration on that occaſion was in the face of an act of parliament, as here ſtated by himſelf.

It is unneceſſary for the preſent to continue what I have to ſay on this part of the defence;

defence; I ſhall poſtpone it therefore until ſomething may render a further ſtricture neceſſary; but, I cannot paſs by that part wherein the author defends the Chancellor on the queſtion of the regency. He makes him declare that the parliament of England can bind Ireland. He makes him ſay that the Engliſh parliament can make a regent for Ireland; he then particularizes the purpoſes to which a regent ſo conſtituted is competent. Here is an anti-declaration of right put into the mouth of the Chancellor, after the declaration itſelf has been paſſed by one country and admitted by the other. This anti-declaration is advanced by the Chancellor on two grounds, and the act of annexation is the firſt: On this act the following obſervations are to be made:

Firſt, That it goes only to a king, and does not go to a regent or council of regency, or any other political body that may be veſted with the executive power; nor can any conſtruction extending that ſtatute

beyond

beyond its letter, in derogation of the privileges of the country, as declared and admitted by the parliament of both kingdoms, be received. No man can diminiſh the king's prerogative by conſtruction, ſtill leſs the power, privileges and rights of the whole legiſlature and the nation; but this conſtruction, ſuppoſing ſuch rights could be diminiſhed thereby, is warranted as little by the ſpirit of the act as by its letter. The object of the act was to raiſe Ireland into an imperial crown, and the act excludes any idea of government, ſave only that of the king. Secondly, it is to be obſerved that the ſtatute does not merge the crown of Ireland, but only annexes it to the perſon of one and the ſame regal character. Thirdly, It is to be obſerved that the executives of the two countries are not by the act confounded, but remain diſtinct, and are proceeding from diſtinct rights, veſted in the ſame regal perſon. Fourthly, It is to be obſerved that the two houſes of the Britiſh parliament did

did not attempt ſuch a conſtruction as is here contended for by the Iriſh Chancellor, for they did not comprehend Ireland in their regency bill.

After being made to ſay that the Engliſh parliament can make a regent for Ireland, the chancellor is made to repent a little of ſuch a doctrine, and to qualify what he advances, by alleging that a perſon ſo conſtituted would be a regent only for particular purpoſes, *imperial purpoſes*, he ſays, by virtue of the act of annexation, and *legiſlative purpoſes, by the act of Poyning's*. I have ſhewn that there is nothing in the act of annexation that can juſtify the conſtruction which gives the Engliſh parliament the power of making a regent for Ireland; but if his conſtruction is law, his diſtinction is not ſenſe, for his principle muſt go to the whole and every part of the executive power, interior as well as imperial; it muſt go to all prerogatives, the words of the act are prerogatives, of which the royal aſſent and diſſent,

that

that is, the legiſlative capacity of the crown, is one. The chancellor's diſtinction therefore is an ignorant dogma, as his conſtruction is an arbitrary and illegal, and unconſtitutional poſition.

That the chancellor's doctrine ſhould be law, he muſt therefore prove two things, 1ſt, that the act of annexation contains a proviſion expreſſing the caſe of a regency, a caſe that is not contained in the act. 2dly, that the act contains another proviſion confining the caſe of a regency to imperial purpoſes; a diſtinction as little comprehended in the act as the caſe. His reſorting to ſuch a diſtinction waves the principle of his conſtruction, at the ſame time that it does not eſtabliſh his diſtinction, which is as little to be found in the act as his conſtruction; but had he ſtated the full extent of that conſtruction, he would have revolted all minds; he is therefore made by the author to inſert a prudential, not a legal qualification, arguing in his own mind a ſuſpicion of his

own

own doctrine, and a juſt apprehenſion of its dangerous and unconſtitutional tendency. The firſt ground therefore which the chancellor is made to take in the act of annexation, we ſubmit cannot be law. His conſtruction is arbitrary, his diſtinction fantaſtical. His ſecond ground is the act of Poyning's, which remains unrepealed as far as it requires the great ſeal of England to be affixed to Iriſh acts, from whence he infers that the Britiſh parliament may make a regent of Ireland, for all purpoſes of legiſlation. The great ſeal of England, ſays he, is a neceſſary organ for making our laws: In legal diſquiſition metaphorical expreſſions are affected and improper. He means a neceſſary ſtamp of authority, without which the royal aſſent cannot be given; and therefore infers that it is in itſelf the royal aſſent. He is miſtaken, the royal aſſent is given in full parliament from the throne, in the Iriſh houſe of lords, which cannot be done by any authority, ſave only the king of Ireland. The great ſeal of England annexed

nexed to Iriſh bills is nothing more than a teſtimonial, authenticating the inſtrument; and it is accompanied by another inſtrument commanding the royal aſſent to be given, which is another proof that the great ſeal does not give the royal aſſent, and until the royal aſſent ſhall be ſo given in parliament, the bill, though under the great ſeal of England, can never have the force of law; which is another proof that the great ſeal does not give the royal aſſent. The error of the Chancellor's opinion on this ſubject was very near being proved by a matter of fact. The mutiny bill, during his ſway in the adminiſtration of the duke of Rutland, had arrived under the great ſeal of England, as uſual, before the old bill had expired, and by ſome neglect the duke of Rutland did not go to the houſe of lords to give the royal aſſent until after. The caſtle was in trepidation leſt the army ſhould diſband.—Why? becauſe they knew the great ſeal was not the royal aſſent; and the chancellor's opinion on this ſubject is not law. We might, however,

allow,

allow, contrary to law, that the great ſeal does give the royal aſſent, yet the inference given to the chancellor, that the regent appointed by the Engliſh parliament, is to all legiſlative purpoſes regent of Ireland, will not follow, becauſe the great ſeal of England is only part of the form, and the great ſeal of Ireland is alſo another part of the form, and the tranſmiſs of Iriſh bills by the Iriſh government another: But let me once more, contrary to law, admit this alſo, yet the chancellor's inference as ſtated above, will not follow, becauſe by a proviſion in that very law, viz. the law of Poyning's as amended, no bill can be tranſmitted to any one, ſave only to the king; the words of the act are *to his Majeſty*, it cannot therefore be tranſmitted to a regent without the interpoſition of the Iriſh legiſlature. In order that the chancellor's doctrine on this head ſhould be law, four things are requiſite to be proved, 1ſt, that the parliament of England can make laws for Ireland. 2dly, that the great ſeal

is the royal aſſent. 3dly, that the parliament of England can diſpoſe of the great ſeal of Ireland as well as of Great Britain, or in other words, that the Britiſh Regent can do ſo, and appoint a Lord Lieutenant to tranſmit the bills under the proviſion of Poynings; and 4thly, that the parliament of Great Britain can repeal a poſitive Iriſh ſtatute. Thus the doctrine of the chancellor, that the Britiſh regent muſt be to all purpoſes of legiſlation regent of Ireland, is not law, no more than the other doctrine attributed to him by the author of the pamphlet, that by the act of annexation the Britiſh regent is to all imperial purpoſes regent of Ireland; neither poſitions are law.

The author having made the chancellor advance, makes him contradict all this moſt extraordinary doctrine on the queſtion of the regency; for he makes him declare in page 17, that a claim in the Britiſh parliament to bind this country was an uſurpation on the rights of a free people. He is made

made to ſay this in 1780; but in 1789, after the parliament of England had acceded to this propoſition, it ſeems the chancellor had altered his mind, and on the queſtion of the regency declared the parliament of England could bind Ireland. He makes him retract that doctrine again, when he makes him ſay that the parliament of England could only appoint a regent for ſome particular purpoſes, viz. imperial and legiſlative; but that a regent ſo appointed could not do divers other acts of executive power. Now the executive is entire, and if an Engliſh ſtatute could not in the caſe of a regent appoint an executive to all purpoſes, it is becauſe it could not appoint an executive to any. The executive legally appointed commands all thoſe inſtruments within the realm and powers neceſſary to its exerciſe; and if a Britiſh parliament could not in the caſe in queſtion give thoſe inſtruments to the Britiſh regent, it is becauſe the Britiſh parliament could not make

an executive for Ireland, it is becauſe the chancellor's doctrine is not law.

The author indeed makes the Chancellor once more give up this doctrine, for he makes him acknowledge his intention to reſort to an Iriſh act of parliament on a late occaſion in the appointment of a Regent: Why? becauſe he felt an Engliſh act could not make one. The imperial and legiſlative power, ſays he, may be given to the Iriſh regent by the Britiſh parliament; but he adds, there is another portion of power which a Britiſh parliament cannot give, and therefore he reſorts to an Iriſh act, which the author declares he intended ſhould be an act of recognition: thus he reſorts to an Iriſh act, becauſe the Britiſh parliament cannot give every neceſſary portion of power to an Iriſh regent; and he chuſes an act of recognition, which implies they can. If his general doctrine is true, the act is unneceſſary; if his diſtinctions are true, an act of recognition is improper and fallacious; it would

would falſify the very neceſſity he owns, and betray the diſtinctions he makes; but the truth is, the government intended an Iriſh act, becauſe the Chancellor's doctrine on the regency was not law, and they preferred an act of recognition to give a falſe teſtimony to that falſe doctrine. We might, however, admit all he ſays here to be law, and yet it would not come up to his point. His argument is, that a Britiſh parliament can bind Ireland. His point, that a Britiſh convention can do ſo, which is going beyond his predeceſſor Lord Clonmel, who in 1780 went no farther than to aſſert the ſupremacy of the Britiſh parliament over Ireland, meaning the king, lords and commons of Great Britain, and not the two houſes of the Britiſh parliament.

When the author makes the Chancellor ſay, that the two houſes of parliament could not ſeparate this kingdom from Great Britain, he makes him convey a very unfounded inſinuation againſt the two houſes,

as

as if they entertained ſuch a wiſh, an inſinuation as unfounded as his charge againſt the people at large at the time of the propoſitions, or his charge againſt the whig club, or the common council, or the aggregate meeting of Dublin, or any other cruel ſuggeſtion uttered againſt the people of this country by this great authority; but when he makes the Chancellor lay it down as an abſtract propoſition, that the people of this country cannot in any poſſible caſe chuſe any regent, except the choice of England, he makes him expoſe himſelf to difficulties of which his lordſhip is little aware. Let me ſuppoſe caſes on the deficiency of the perſonal exerciſe of the regal power, where the two houſes of the Britiſh parliament, overlooking the heir apparent, ſhould veſt the executive in the council of regency, compoſed of the Queen and the ſervants of the crown, or overlooking the monarchical form of government, ſhould *pro hac vice*, veſt the executive in themſelves; according to this doctrine attributed to the Chancellor, Ireland

land is bound in the firſt of theſe caſes to paſs by the line of ſucceſſion; in the ſecond, to overturn the monarchy; but the proper method of anſwering the Chancellor in this doctrine is to refer him to Mr. Pitt, whoſe principles, as comprized in his declaration of right, maintain that by the conſtitution of the realm the two houſes are competent to ſupply the defect in the perſonal exerciſe of the regal power, in ſuch manner as ſeems to them moſt expedient, and of courſe may change or diſpenſe with, on ſuch an occaſion, the ordinary ſeals or inſtruments of authority, if that ſhould be found neceſſary, and may go farther; for you will find in the proceedings of the Britiſh parliament on the regency, that the two houſes may and did take away great branches of the prerogative, and eſſentially abridge the powers of the monarchy; If therefore the Chancellor chuſes to go into abſtract queſtions, touching the privileges and powers of the people in caſes of exigency, he will find from the principles and precedents

precedents laid down by his own Engliſh party, the popular reſources of the conſtitution, which are the ſame in both countries, to be greater than a crown lawyer would at firſt be apt to enquire.

It is not wiſe to bring on the abſtract principle of the rights of the people unneceſſarily. The parliament of Ireland never brought forward ſuch diſcuſſion on the queſtion of the regency; they adhered to the line of ſucceſſion in the perſon of the heir apparent, who was certain to be the regent of England. They met oppoſition from an adminiſtration, who told one country ſhe had no power on that queſtion, and told the other her powers had no limitation.

I have delayed thus longer on this point, becauſe ſuch doctrines as the author of the pamphlet has revived in the mouth of the Chancellor ſhould never appear without being rebuked and humbled. As his lordſhip

is

is known to have expreſſed at different times, and in a very public manner, his contempt for the compoſition of other men, I think the moſt reſpectful and complete anſwer is to inſert his own. It is as follows. See the pamphlet, entitled Obſervations on the Whig Club Vindication, p. 16.

" The Chancellor did alſo aſſert, in the " year 1789, That the ſtatute laws of this " country having annexed the crown of " Ireland to the crown of England, and " declared it, together with all the powers " and prerogatives annexed to it, to be de- " pendant upon the crown of England, the " two houſes of parliament could not by " law ſeparate this country from Great " Britain, during the minority or other legal " incapacity of the king of Great Britain " and Ireland. He did aſſert that the ſta- " tute law of Ireland had made the great " ſeal of England a neceſſary organ of Iriſh " legiſlation, and had therefore diſabled any " perſon, who by the laws of England had " not the command of that organ, from

" *acting*

" acting as regent of Ireland. From which " he inferred, *That whatever powers the* " *parliament of Ireland might think to intruſt* " *to their regent, that they were bound to* " *the perſon who was appointed regent of* " *Great Britain by the parliament of that* " *country; for that our ſtatute law having* " *annexed the crown of Ireland to the crown* " *of England, by neceſſity the Regent of Eng-* " *land appointed by ſtatute muſt, to all im-* " *perial purpoſes, be regent of Ireland, and* " *our ſtatute law having made the great ſeal* " *of England a neceſſary organ of Iriſh legiſ-* " *lation, the regent of England, who could* " *alone command that organ, muſt to all pur-* " *poſes of legiſlation be regent of Ireland.* But " that as to all acts which are done in this " country by the authority of the king's " ſign manual, the authority of a regent, " appointed by a Britiſh ſtatute, muſt be " recognized by an act of the Iriſh parlia- " ment, to give it effect in this country; " and the Iriſh nation are in poſſeſſion of

the

" the arguments advanced by the Chancel-
" lor in ſupport of this opinion, and of the
" anſwers which were made to them at the
" time they were advanced."

In line 8, he changes the *terms* of the act, and inſtead of the word *crown*, ſays *country*; ſeparating the country is become a figurative expreſſion. The eſtabliſhing the independency of the Iriſh parliament was by ſome of the political friends of the Chancellor called ſeparating the countries; the ſtruggles of the people againſt the propoſitions were by himſelf arraigned as attempts to ſeparate the countries; to make his propoſition legal and not figurative, we will reſtore the words of the act and ſay, ſeparate the crowns, and then it will remain for him to prove that the appointment of the heir apparent was an attempt to ſeparate the crowns, and that the regent is the king, and not a perſon acting on his behalf and in his name.

In

In line 18, he profeſſes to make a legal inference from the act of Poyning's, and he grounds that inference on proviſos contained in the act of annexation, which was not made till a ſubſequent reign, and which he acknowledges applies to a different purpoſe. Imperial purpoſes, ſays he, not legiſlative; by the act of Poyning's, ſays he, you are bound to chuſe the Britiſh regent, becauſe by another act paſſed long afterward, you have no power to chuſe a regent at all; and the Britiſh parliament may make a regent for you. The fabrication of his ſyllogiſm is remarkable; he plants his firſt premiſe, according to the ordinary rule of logicians, in the van; he puts his weak part, his concluſion, in the centre, and his ſecond premiſe he draws up in the rear; and he deduces his concluſion from the firſt premiſe for the reaſons which are to follow in the ſecond; and then he brings down his firſt premiſe and places it behind the whole, interpoſing between theſe running premiſes running

ning concluſions, all different, all unconſtitutional, and all non ſequiturs; and then he concludes this moſt extraordinary piece of argument by giving up whatever law, ſenſe or logic may be contained in it, and propoſes to reſort to an Iriſh act of parliament after all.

But it would be unreaſonable to attack a ſentence of the Chancellor's, merely for a defect in perſpicuity and logic. Let us examine its contradiction. The Chancellor is made to ſay, that the Britiſh regent is regent for Ireland, for *all* imperial and legiſlative purpoſes; but there is a third diviſion of power for which the Chancellor declares he is not our regent; that purpoſe he deſcribes to be acts done in Ireland under the authority of the ſign manual; now all commiſſions in the army are under the ſign manual, of courſe the filling up all military commiſſions in Ireland; the whole appointment and regulation of his majeſty's

forces

forces in Ireland, is an imperial act done in Ireland under the authority of the ſign manual. The patent that appoints the chief governor is made out purſuant to a king's letter under the ſign manual, and of courſe all acts of government, all proclamations for peace or war, &c. The whole executive and every imperial purpoſe thereof within this realm are ultimately under the authority of the ſign manual *. By our law, every bill that paſſes the two houſes of parliament muſt be tranſmitted to his majeſty by the chief governor and privy council, but there can be no chief governor, and of courſe no tranſmiſs, without the ſign manual, and thus every legiſlative purpoſe of government depends ultimately on the ſign manual. It follows, that the Britiſh regent, whom the Chancellor declares to be incompetent to acts

* A king's letter comes to Ireland under the ſign manual, ordering that a patent may be made out for the lord lieutenant, which is done accordingly, and is an act done in Ireland under the authority of the ſign manual.

acts done in Ireland under the authority of the ſign manual, is by that declaration confeſſed not to be regent for Ireland for all legiſlative and all imperial purpoſes; on the contrary is declared, by his own confeſſion, to be incompetent to every legiſlative and every imperial purpoſe within the realm; and it is thus confeſſed by the Chancellor that the act of annexation does not enable *the Britiſh parliament to make a Regent for Ireland for Imperial purpoſes, nor the act of Poyning's for legiſlative, and thus his whole doctrine on the queſtion of the Regency falls to pieces.* What he ſays in reſpect to the ſign manual ſeparates the two governments as compleatly as any doctrine he charges on others, at the ſame time that what he ſays with reſpect to the great ſeal, together with the other parts of his doctrine, extinguiſh the conſtitution, and the different parts of his diſcourſe by *jux tapoſition* extinguiſh themſelves: Nor let him hope to eſcape by ſaying, that he only ſpeaks to the ſpecial caſe of 89, when there was an exiſting

iſting chief governor. Firſt, becauſe he ſpeaks generally, and draws *general* falſe concluſions of conſtitution and government. But I will allow him, if he pleaſes, to ſpeak ſpecially here; yet his argument is equally contradictory, for the lord lieutenant being by patent, made out under the authority of the ſign manual, could not be by his own acknowledgment the officer of the Britiſh regent, who could not therefore be ſaid to be regent for thoſe imperial and legiſlative purpoſes for which that lord lieutenant was competent. If it ſhould be ſaid, that the paragraph here introduced and marked page 16, is not an epitome of the doctrine given to the Chancellor on the queſtion of the regency, the author of this, however convinced he may be that it is, will deſpiſe to take any advantage, and ſhall examine the ſpeech at large. In the mean time he thinks himſelf juſtified in aſſerting publicly that the doctrines attributed to the Chancellor on the queſtions of the city and regency

gency are not law, and that they are proved to be illegal by himſelf. The writer of this does not call thoſe doctrines of the Chancellor the greateſt *nonſenſe* or traſh that ever came from a man wearing a bar gown, but he hopes their fate will be a leſſon to his lordſhip from henceforth to ſtrike ſuch words out of his vocabulary.

The Chancellor, in the cloſe of his defence, is made to ſuggeſt that he will repel any attack on the law or lawful authority. The gentlemen of this country will exerciſe the ſame privilege, and if ever again any attack ſhall be made on the laws, the perſon who makes that attack ſhall be rebuked and humbled, even though he were the LORD HIGH CHANCELLOR OF IRELAND.

The writer of this had no object but to expoſe the preſumption, ignorance and contradiction of certain unconſtitutional and illegal doctrines. 'Tis therefore the writer

 has

has not obſerved on other parts of the defence, which admit however of much animadverſion, particularly one part, in which the Chancellor's advocate ſays, that the committee of the whig club knew *his hands were tied behind his back.* The writer of this imagines that it were for the advantage of the Chancellor that ſuch an obſervation ſhould not be diſcuſſed, becauſe it contains a ludicrous inſinuation, and expoſes him to many ludicrous retorts, if the writer of this would condeſcend to be pert and petulant. It is a new feeling, improper in a Chancellor if real, and ſtill more unbecoming if fictitious; it has the appearance of crying out for help, and inviting his companions to become his champions; it would be unbecoming to inſinuate, as well as unjuſt, that the Chancellor was prompted to reflect on the whig club from the conſideration of perſonal ſafety; but to ſuppoſe that the members of that club could be prompted or encouraged,

or deterred or affected by any ſuch conſideration, or by any circumſtance that could attend the perſon of the Chancellor, is too ridiculous. It is his doctrine that is formidable. To refute that, and to anſwer him in his own ſcience, in which on ſome late occaſions he was bold and dangerous, is the object of this eſſay; or rather, indeed, as ſome great adepts in the law are impatient of anſwers from other men, it has been judged expedient in theſe pages to make this great authority anſwer himſelf.

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APPENDIX.

Easter Term.

5 Annæ reginæ, B. R. 1706.

Regina *verſ.* Majorem et Aldermannos Norwici.

* A *Mandamus* to admit one Dunch alderman of Norwich, and ſwear him. To this they returned a charter of Edw. 4. that the aldermen of Norwich *onerarentur et exonerarentur* as the aldermen of London; and that in London if a perſon be elected alderman by the ward, the court of aldermen may refuſe him; and that Dunch was elected by the ward, but was refuſed by the mayor and aldermen, becauſe he had not qualified himſelf according to the corporation act, he not having

* *S. C. Salk.* 432, 436.

ing received the ſacrament according to the rites of the church of England, within a year next before his election; and that he was a turbulent perſon and factious, and that he procured his election by bribery: and then at the end of the return they returned, *quod non fuit electus*.

It was admitted of all hands that the matter of Dunch's not having received the ſacrament within the year before his election made his election void, and had been a ſufficient return, if it had ſtood by itſelf. But in regard the return was repugnant and contradictory, the court granted a peremptory *mandamus*. The chief juſtice ſaid, the court could not believe them, when by their return, firſt they admit an election and avoid it, and then deny that Dunch was elected. A return may contain as many cauſes as the perſons that make the return pleaſe, but then they muſt be diſtinct independent matters. So here a refuſal might be well returned, and alſo that Dunch had not received the ſacrament; both which make the election void: but then you come and contradict all the former part of your return, and ſay Dunch was never elected. To avoid this contradiction it is urged, that the election by the ward is no election; becauſe it is not conſummate till it is approved by the mayor and aldermen. But this chuſing by the ward is an election, for they have ſeveral perſons

to

to chuſe out of; but the mayor and aldermen have no choice, but only approbation; for they cannot chuſe. The election and approbation are diſtinct acts to be done by ſeveral parties. And if the election be conſummate before the approbation, then the return is contradictory, in returning an excuſe why D. was not approved, and then returning that he was never elected.

Powell juſtice. If the return be not contradictory, it is very inveigling; the court cannot tell what you rely upon. The election and approbation are two different things, and the election is conſummate without the approbation. The power of the biſhop to approve the preſentee, is different from the preſentation. And ſo is the nomination of one (where the caſe is that J. S. is to preſent ſuch an one as J. N. ſhall nominate) from the preſentation: and the preſentation is over before the approbation, and the nomination before the preſentation. So here the election is over before the approbation. *Non fuit electus* in the return, muſt be underſtood, that Dunch was never elected by the ward.

Powys and Gould agreed. But Powys thought (upon the caſe which had been cited out of 1 *Sid.* 286. where, though the return was inſufficient, yet the court would not grant a peremptory *mandamus*, becauſe the right was againſt the perſon that

that ſued the *mandamus*; but ordered the right to be tried) that it appearing to them upon the return that Dunch's election was void on the corporation act, they ought not to grant a peremptory *mandamus*.

But the chief juſtice ſaid, it did not appear; for the court could not tell what to believe, when the return was contradictory to itſelf. * And he ſaid, a peremptory *mandamus* would not make the election good, but upon an information, the election might be avoided, and Dunch turned out.

Powell. The return can never be made good.

Upon the argument of this caſe the chief juſtice ſaid, that as to the procuring his election by bribery, it would be a queſtion whether that would make the election void, unleſs it were to an office within the ſtatute of Edw. 6. for though elections ought to be free, yet an elector might uſe his liberty to vote for him that had given him money. § And he remembered a caſe between Blancard and Galley, where in an action of debt upon a bond conditioned for paying part of the profits of the office of provoſt marſhal within the iſland of Barbadoes, it was reſolved, that if it had concerned

* 1 *Sid.* 286. § *Salk.* 411.

concerned the ſame office in England, the bond had been void by the ſtatute of Edw. 6. but the office being in Barbadoes, the bond was held good, though it was concerning the adminiſtration of juſtice.

He ſaid, the method of chuſing aldermen in London was thus. The inhabitants of the ward chuſe two, and if the court of aldermen think them inſufficient, they may reject them, and order the ward to chuſe again. † And he ſaid, that in the lord chief juſtice Kelynge's time, in the caſe of one Mr. Swallow, the cuſtom of London was certified to be, that if a man be choſen alderman and refuſe to ſerve, the court of aldermen may commit him to Newgate, as for a contempt; but if he fines, then the way is to ſwear him alderman, and then diſcharge him by conſent.

† 1 *Sid.* 287.

Hilary

Hilary Term 30 Geo. 2.

Wedneſday 26th Jan. 1757.

Green *verſ.* Mayor of Durham.

Mr. Juſt. Wilmot abſent (in Chancery.)

THIS caſe was ſet down in the crown-paper, as a ſpecial verdict, and was ſo called; and was argued by one counſel on each ſide, in the ſame manner as if it had been a ſpecial verdict: But it was only a verdict upon ſix ſeveral traverſes to the return of a *mandamus* (on 9 Ann. c. 20.) directed to the mayor of Durham, commanding him to ſwear and admit Robert Green into the place and office of a freeman of the company or fraternity of free-maſons, &c. of the city of Durham.

The right ſet up by Robert Green was his having been duly elected and admitted a freeman of the company: But the objection to his being ſworn by the mayor, was, "That he had not conformed to "certain by-laws particularly ſpecified in the re-"turn and found by the verdict."

The return was—That Durham is and from time immemorial hath been an ancient city, &c; and alſo, that a power is given by a charter of Tobias then biſhop of Durham, (in 44 Eliz.) confirmed by king James firſt, to the mayor, aldermen and common-council for the time being, or the major part of

of them, (of whom the mayor and ſix of the aldermen to be ſeven,) to make by-laws, in the ſtead, for, and in the name of the whole corporate body of the city of Durham and Framwelgate.

Then the return ſet forth, that certain by-laws were duly made by the mayor, aldermen and commonalty, in due manner met and aſſembled at the Guildhall, &c. on 8th November, 1728. And it particularly ſets forth and ſpecifies three ſeveral by-laws, as having been then there made by them; to wit—

1ſt. By-law. That for the effectual preventing all perſons being made free, that have not a right or title to their freedom in the ſaid city, and for the better regulating of the ſame, The mayor, one or more alderman or aldermen of the ſaid city, and the wardens and ſtewards of the ſeveral and reſpective companies for the time being, ſhall, from henceforth meet at the Guildhall or Toll-booth in the ſaid city, four times in every year, viz. on the firſt Monday after Martin-mas, the firſt Monday after Candle-mas, the firſt Monday after May-day, and the firſt Monday after Lammas. And every perſon that is hereafter to be admitted a freeman of the ſaid city and borough of Framwelgate, ſhall be then and there called, at three of the ſaid ſeveral meetings, before ſuch his admittance to be a freeman; and to be approved of by the ſaid mayor and one

one or more alderman or aldermen, and the wardens and ſtewards of the ſeveral and reſpective company or fraternity (for the time being) whereof he or they is or are to be made and admitted a freeman or freemen reſpectively, or the majority of the ſaid mayor alderman or aldermen and wardens of ſuch reſpective company then and there preſent.

2d. That any warden ſteward or other freeman that ſhall make any perſon a freeman of the ſaid city or of any company therein, contrary to the ſaid laſt ordinance or by-law abovementioned, ſhall reſpectively forfeit and pay the ſum of 30 l. to the mayor aldermen and commonalty of the ſaid city of Durham, to be by them recovered by action, or diſtreſs of the offender's goods, or otherwiſe, and to be paid into the cheſt or hutch, for the uſe of the ſaid mayor aldermen and commonalty, to defray any public expence that may happen to the ſaid corporation or fraternity.

3d. That in caſe the mayor of the ſaid city for time being ſhall ſwear any perſon that has not actually ſerved ſeven years as an apprentice with a freeman of one of the ſaid companies or fraternities belonging to or uſed in the ſaid city, or ſhall not be juſtly intitled to the ſame by ancient uſage or cuſtom within the ſaid city, he ſhall forfeit and pay the ſum of 30 l.: Which ſaid ſum ſhall be recovered &c. *ut ſupra*, and to be paid *ut ſupra*.

All

All which ſaid ſeveral ordinances and by-laws the return alledges to have, ever ſince the making thereof, been conſtantly obſerved and kept &c. and to be ſtill in their full force and virtue, &c.

That Robert Green was not elected and admitted a freeman of the ſaid company of free-maſons, rough maſons, wallers, paviours, plaiſterers, ſlaters and bricklayers.

That Robert Green was never duly called to be a freeman of the ſaid city of Durham and Framwelgate, nor ever approved of by the mayor and one or more alderman or aldermen of the city of Durhum and Framwelgate aforeſaid, and the warden and ſtewards of the ſaid company or fraternity of free-maſons &c. before his ſuppoſed election and admiſſion to be a freeman of the ſaid company or fraternity, according to the firſt ordinance or by-law above mentioned, as he ought to have been.

And for theſe reaſons the ſaid mayor has not ſworn and admitted him, nor adminiſtered the oaths to him uſually taken for the due execution of the ſaid office.

Upon this return, Green takes 6 ſeveral traverſes: on which iſſues were tried.

1ſt Iſſue. That the mayor, aldermen and commonalty did not duly meet &c. on 8th November 1728, in order to make by-laws &c. *modo & forma &c.*

2d Iſſue.—That they did not in due manner make the firſt by-law mentioned in the return.

3d Iſſue—That they did not in due manner make the ſecond by-law mentioned in the return.

4th Iſſue—The like denial of their making the third by-law mentioned in the return.

5th Iſſue—That he was elected and admitted a freeman of the ſaid company or fraternity of freemaſons, &c. as in the writ is alledged.

6th Iſſue—That he was duly called to be a freeman of the ſaid city of Durham and Framwelgate aforeſaid, and was approved of by the wardens and ſtewards of the ſaid company to be a freeman of the ſaid city of Durham and Framwelgate.

The jury find, As to the 1ſt iſſue—That upon the 8th of November 1728, the then mayor and aldermen and commonalty did in due manner meet and aſſemble, at &c. in order &c. in ſuch manner and form as the ſaid mayor by his return hath alledged.

As

As to the 2d iſſue—That the ſaid mayor, aldermen and commonalty did then and there, in due manner, make the 1ſt by-law in the return mentioned, in ſuch manner and form as is therein by the ſaid mayor alledged.

As to the 3d iſſue—That they did in due manner make the 2d by-law, in manner and form &c.

As to the 4th iſſue—The like finding, with regard to 3d by-law:

As to the 5th iſſue—That Green was elected and admitted a freeman of the company, as in and by the writ is alledged: But that before ſuch his admittance, he was not called at any meeting held according to the ſaid by-law in the ſaid 2d iſſue mentioned, nor approved of by the then mayor and one or more alderman or aldermen and warden and ſtewards of the ſaid company or fraternity, nor by a majority of them, according to the ſaid by-law.

As to the 6th iſſue—That the ſaid Robert Green was not duly called to be a freeman of the ſaid city of Durham and Framwelgate, and approved of by the wardens and ſtewards of the ſaid company or fraternity of free-maſons, rough maſons, &c. to be a freeman of the ſaid city of Durham and Framwelgate.

This

This caſe was argued on the 24th of November 1756, by Mr. Ambler for the plaintiff, and Mr. Clayton for the defendant; when the court ordered it to ſtand for judgment of the then next term.

Lord Mansfield now delivered the reſolution of the court.

The general queſtion depends upon Robert Green's right to the franchiſe which he claims.

The objection to his right ariſes from his not being qualified according to the by-law.

If the by-law is good, and binding, and he appears to be an object of it; he is certainly not qualified, and the mayor has returned a ſufficient reaſon for not admitting and ſwearing him.

All the objections which have been made, therefore, tend to ſet aſide the by-law; or, if the by-law be good, to ſhew that Robert Green's caſe is not within it.

It has been argued that the by-law is void, upon two grounds;

1ſt. From want of authority to make it;

2dly. From the ſubject-matter.

As

As to the firſt—The objection is, That the by-laws are returned to be made by the mayor, aldermen, and commonalty; whereas the power is given to the mayor, aldermen, and 24 common council or the major part of them; of whom the mayor and ſix aldermen ſhould be ſeven.

Anſwer. The power to the ſelect number is, "to make by-laws in the ſtead, for, and in the "name of the whole corporate body." Theſe by-laws might be made by the ſelect number, acting in the name of the whole corporate body; and muſt be ſo intended: For the jury find, "that "they did in due manner meet, and in due man-"ner make the by-laws."

As to the ſecond—That the by-law is unreaſonable and void: For it is likened to the caſe of the taylors of Ipſwich, 11 Co. 53. A by-law "that "none ſhould work at his trade until he had pre-"ſented himſelf to the company of taylors, and "proved that he had ſerved 7 years as an appren-"tice, and admitted by them to be a ſufficient "workman."

Anſwer. In that caſe, the by-law was againſt law: It was againſt the 5th of Eliz.; and a farther reſtraint than the act had made.

But this by-law is not againſt any law—It is not a reſtraint upon trade; but ſeems a reaſonable regulation, to prevent perſons being unduly made free, who are not intitled by birthright, ſervice, or purchaſe. It provides a method for previouſly examining into the right of thoſe who claim to be made free.

Obj. "That there is no method to compel a "meeting of the mayor, alderman or aldermen "and the wardens and ſtewards of companies."

Anſwer. This objection extends equally to all corporate aſſemblies, by cuſtom, charter or by-law. But there is a known method, by *mandamus*.

Obj. If a perſon has a right to be admitted a freeman, yet unleſs he be approved of by the mayor &c. he is not to be admitted. And there is no method to compel them to approve.

Anſwer. If the mayor, &c. diſapprove, without cauſe, a *mandamus* will lie, ſuggeſting the qualification and right of the perſon claiming to be a freeman, and commanding the mayor to approve and admit.

But ſuppoſing the by-law good, it has been argued, that this caſe is not within it.

1ſt Obj. The *mandamus* is, to admit Green to the freedom of the company: The by-law relates only to the freedom of the city.

Anſwer. It appears from the ſecond by-law, to be the ſame thing.

2d Obj. The by-law prohibits indeed the election of perſons not called, and approved, &c; and ſubjects diſobedience to a penalty; but does not make the election void, and cannot transfer the right of election veſted in the electors, to the mayor &c.

Anſwer. Theſe objections are founded upon a miſunderſtanding of the by-law, and a miſconception of the nature of the caſe. The writ recites "that Green had been duly elected and admitted a freeman;" and therefore commands the mayor to ſwear him—The mayor returns the by-law &c; and "that before Green's ſuppoſed election and "admittance (by the company) to be a freeman, "he was not called and approved by the mayor "&c." And the fact found by the jury is, "That he was elected and admitted by the com-"pany; but not called and approved by the mayor, "&c." So that it appears upon this record, that the intent of the by-law was, that no perſon ſhould be elected and admitted a freeman of the company, unleſs he was called at the aſſembly and

approved &c. which was a previous act to be done before the company could elect him; the way to prevent the abuse "that the company unduly ad-"mitted persons to their freedom:" And the se-cond by-law inflicts a penalty on the company, who should make any one free, without the pre-vious calling and approbation; And the third by-law inflicts a penalty on the mayor, who should swear any such person.

The stating the fact answers both the objections. For the by-law makes the appearance and approba-tion a necessary qualification to the being made made free by the company, and a restraint upon them to elect any one to his freedom before his conforming to the by-law: And the right of elec-tion is not transferred to the mayor, but remains where it was.

Obj. It is not returned "that there was any "assembly, at which Green might appear, to be "called."

Answer. It shall be intended,—And if in fact there was no assembly, Green might have plead-ed it as an excuse.

Obj. He might have been elected and admitted, before the making this by-law.

Answer.

Anſwer. The jury have found, " that he was " elected and admitted: But that he was not " called and approved purſuant to the by-law." So that the by-law was in being, at the time of his election &c.

It is to be obſerved, that it is not ſtated, what is the method of the company's electing freemen, nor any thing in the charter concerning it. For aught that appears, the firſt by-law may be agreeable to the ancient uſage, and revived by this by-law and enforced with penalties: But ſuppoſing it to be introductory of a previous qualification, it ſeems to be reaſonable and well calculated to prevent improper perſons, not intitled, being made free. It is much more reaſonable than the cuſtom of London, " that no broadcloth ſhould be ſold, but what " was brought to Blackwell-hall to be examined;" 5 Co. 62. Yet this cuſtom was held good; becauſe it was to prevent fraud.

We are of opinion that none of the objections are well founded; and therefore that the return ought to be allowed.

Conſequently, as this was the caſe of traverſing a return to a *mandamus*, purſuant to the ſtatute of 9 Ann. c. 20. the rule was taken.

That judgment be entered for the defendant.

FINIS.